



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103034/2023

**Held in Glasgow on 22 and 23 January 2024; and via Cloud Video Platform
(CVP) [for submissions] on 24 January 2024
Deliberations: 25 and 31 January 2024**

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**Employment Judge D Hoey
Members: Ms D McDougall and Mr J McCaig**

Mr C Gallacher

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**Claimant
Represented by:
Mr K Gibson -
Counsel [Instructed
by Messrs Allan
McDougall]**

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Scottish Ambulance Service Board

**Respondent
Represented by:
Mr D James -
Counsel [Instructed
by CLO]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The unanimous Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed and the claim is dismissed.
2. The remaining complaint (of detriment by reason of participation in relevant trade union activities pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992) is dismissed having been withdrawn.

REASONS

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1. The claimant raised a claim for unfair dismissal and trade union detriment on 24 May 2023. The claims were disputed and by the outset of the hearing, the claim had been focussed to that of unfair dismissal only, the argument being the dismissal fell outwith the range of reasonable responses. The claim was considered by a full panel.

Case management

2. The parties had been asked to finalise a list of issues and statement of agreed facts which developed during the course of the hearing and was finalised.
3. The parties had worked together to focus the issues in this case. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost, and proportionality. The case was able to conclude within the allocated time.

Issues to be determined

4. The issues to be determined are as follows (which is based on the agreed list which has been revised).
- a. It was conceded that the claimant was dismissed for a potentially fair reason, namely matters relating to conduct.
 - b. The parties had agreed the live issue was whether the respondent acted reasonably in treating that as a sufficient reason to dismiss taking account of size, resources, equity and the merits of the case. In other words, was the decision to dismiss the claimant within the range of reasonable responses. The claimant alleged it was unfair on the basis of the following factors, considered either alone or together:
 - i. The claimant's length of service;
 - ii. The claimant's clean disciplinary record;
 - iii. That at the time of the misconduct found, there was no written policy about the use of pool cars;
 - iv. That others had used respondent's property for non-business or private reasons;
 - v. The claimant had admitted his use of the pool car at the outset;

- vi. The claimant admitted an error of judgment, apologised to the respondent and indicated he would not do the same thing again;
 - vii. The claimant offered to make payment for any financial loss suffered;
 - 5 viii. the claimant had not intended there to be a break from duties (as (he hoped) the trip would be completed during a break);
 - ix. that while the claimant had instigated matters, he did not authorise use of the pool car on the evening in question; and/or
 - x. there had been around 10 months between the misconduct and
10 the disciplinary hearing.
- c. if necessary, remedy would require to be considered (and the parties had agreed a significant amount of information with regard to remedy).

Evidence

- 5. The parties had agreed a bundle of 669 pages with a few more documents
15 added at the start of the hearing.
- 6. The Tribunal heard from Ms Higgins (the dismissing officer), Ms Carter (who chaired the appeal hearing) and the claimant. The witnesses each gave oral evidence and were cross examined and asked further relevant questions.

Facts

- 20 7. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was
25 resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The vast majority of the facts were not in dispute in this case.

Background

8. The respondent operates three multi-site Ambulance Service Control Centres. These are critical national infrastructure resources that provide the hub of clinical and operational decision making to ensure patients receive the most appropriate response including advice, mode of response and referral to other agencies. The Centre receives 999 calls from the public, and calls to request ambulances from General Practitioners or other medical professionals.
9. The respondent operated across Scotland with over 3000 employees in total. It had the support of an HR team with appropriate legal support.

10 **The claimant's role**

10. The claimant was employed as Duty Manager, in the West Centre. He held that position for a period of 5 years and 8 months. That was a position of trust and required sound decision making skills and leadership capabilities. Duties involved overseeing day to day activities of the centre and being responsible for the best use of resources. It was a position of responsibility with considerable autonomy.
11. The claimant was employed for a period of 20 years. He was also Branch Secretary for a recognised trade union.

Contractual and policy documents

12. The claimant was subject to a contract of employment together with relevant policy documents which included an investigation policy and a conduct policy. That stated that the sanction should take account of all the circumstances. The conduct policy made it clear that examples of gross misconduct includes "gross irresponsibility".
13. The claimant was familiar with the contract and policy documents, more than many other staff (given his trade union role). The contract documents which applied to staff (such as the claimant) included "Agenda for Change" documents, one of which stated that pooled vehicles were "only available for business use".

Claimant requests use of respondent's vehicle for personal use

14. The respondent was advised on 19 July 2022 that the claimant had allegedly used the respondent's property for his private use. It was alleged the claimant had sought to use (and used) a pool car to collect him (and his family) upon return from holiday on 17 July 2022. The complaint about the claimant's conduct was copied to an MSP (and journalist).
15. The respondent investigated the complaint and suspended the claimant on 19 July 2022.

Newspaper article

16. On 1 August 2022 an article appeared in a national newspaper entitled "Scots ambulance boss had 999 call handler leave post to pick him & family up from Glasgow Airport". The claimant was not mentioned by name in the article which did not place the respondent in a positive light given the challenges placed upon public funds.

Detailed investigation takes place

17. An in depth and detailed investigation was carried out by the respondent.
18. At the time of investigation there were no live disciplinary sanctions in the claimant's employment record.
19. Investigation interviews were held with the Head of Service, Duty Manager, 2 Supervisors, General Manager Fleet and the claimant with 2 other individuals providing responses to questions in writing.
20. The claimant was accompanied by his union representative at the investigation meeting and accepted that on 17 July 2022 he was collected from the airport upon his return from holiday in a pool car, having asked that this be done.
21. The investigation was completed in February 2023 and the investigator recommended the claimant address 4 allegations: organising and authorising the use of a vehicle for personal gain; asking a colleague to use a vehicle,

whilst they were on shift, knowingly depleting cover for personal gain, with a potential impact on patient safety; actions amounted to an abuse of power, position and misuse of public funds which may be considered fraudulent and a breach of organisation values.

5 **Disciplinary hearing takes place**

22. The claimant was invited to a disciplinary hearing on 11 April 2023. A further fifth allegation was put to the claimant in the hearing. This allegation was that the claimant through his actions brought the Service into disrepute. The claimant agreed to that matter being considered as a further allegation at the hearing (and that further delay could be avoided).

23. The Disciplinary Hearing took place on 10 May 2023. The disciplinary officer was Dr Higgins, a Deputy Regional Director who had been trained in conducting disciplinary hearings and had significant experience in such matters. The hearing was lengthy (lasting from 10am until after 6pm in the evening). The dismissing officer spent a very considerable period of time considering all the matters the claimant raised.

Disciplinary hearing outcome

24. One of the allegations that had been proceeding to the disciplinary hearing (that the claimant had displayed intimidating, bullying and underhand management) was not progressed and as a result that allegation was dismissed. There was no evidence in support of that allegation.

25. The disciplining officer upheld each of the remaining allegations either in full or in part, as set out in her letter of 17 May 2023 to the claimant.

26. In relation to the **first allegation**, that the claimant organised and authorised the use of a pool vehicle for his own personal gain, the claimant had agreed he had made the request but disputed that he had authorised it. The claimant he had not expressly asked the duty manager on shift on the night in question, but he had assumed the duty manager on the night in question would have been asked to authorise it. In any event the claimant accepted he did initiate the arrangement. He accepted with hindsight he had erred.

27. The dismissing officer noted that the claimant had in fact asked “a favour” from a colleague (who was at the same managerial level as the claimant) and concluded that the claimant did not consider that he needed to seek authorisation as the claimant believed he could use the pool vehicle as he wished. As duty manager the claimant ought to have known that the respondent’s resources should not have been used for purely personal gain. The fact he had asked a colleague, at the same level as him, to use the pool car for his sole personal use ought not to be considered, by a duty manager, ever to be permitted. The allegation was accordingly upheld.
28. The **second allegation** was that the claimant asked a colleague to use a respondent vehicle while on shift knowingly depleting cover, for his own personal gain with a potential impact to patient safety. The claimant had admitted he had specifically requested a particular colleague (who was junior and relatively new in post) to take the pool car during shift to collect the claimant. The claimant had said he intended the individual collect him during an unpaid break. He had hoped the trip in total could have been completed within the 45 minute break.
29. In fact on the night in question there had been a high number of calls and some patients were waiting for lengthy periods of time. It was accepted that the claimant had assumed the journey would be done during a break but that was not what had happened and while the claimant had not intended his request to impact upon patient safety it clearly had the potential to do so. The third allegation was therefore upheld to that extent.
30. The **third allegation** was that the claimant’s actions were an abuse of power and position and a misuse of funds which could be fraudulent. The claimant as duty manager has a high level of autonomy and leadership. His request to a junior employee could be perceived as a managerial instruction (irrespective of intent). The dismissing officer accepted there was no fraudulent intention nor attempt to deceive but the claimant had abused his position by using a vehicle for personal use.

31. The **fourth allegation** was that the claimant's actions had breached organisational values. The dismissing officer concluded the claimant's actions were irresponsible and failed to reach the levels expected of a manager.
32. The **fifth allegation** was that the claimant's actions had brought the service into disrepute. The newspaper article was negative and it was the claimant's actions that led to the article being published (even if the claimant had not contacted the journalist in question). The claimant had argued he did not think he had done anything wrong at the time and with hindsight would not make the same mistake again. This allegation was upheld.
33. The action the claimant had taken that led to the allegations in this case were considered by the trade union representative of the claimant to be such that the claimant his representative "shredded him" upon learning of what the claimant had done. None of the claimant's witnesses were able to provide any examples of the respondent's vehicles being misused. One of the respondent's managers (at a higher level than the claimant) had made it clear that it ought to have been obvious that the absence of a policy did not alter the position that it ought to have been obvious (and understood amongst managers) that a service vehicle should only be used for service business.

Points raised on claimant's behalf considered

34. The dismissing officer took account of all the points raised by the claimant and on his behalf during the disciplinary process. That included the claimant's long and unblemished service and that this was the first incident that had arisen. The length of time taken to deal with matters was also taken into account.
35. The dismissing officer also placed in the balance the fact there was no clear policy with regard to use of the pool car and that there had been other apparent misuse of the respondent's property (which information had been passed to a senior officer to investigate and take action as appropriate). There was no evidence the respondent had permitted purely personal use of the respondent's property but the claimant's knowledge of others misusing

property, as the context within which he made the decision, was taken into account.

36. The claimant had offered to repay any financial losses incurred (which was taken into account by the respondent).

5 37. The dismissing officer considered the full picture and the information before her in light of what the claimant had said and what had been presented on his behalf. She firstly determined that the claimant's conduct fell to be considered (individually) as gross misconduct in respect of allegations 1, 2 3 and 5. In relation to each individual allegation she would have found the claimant's
10 conduct to amount to gross misconduct and to have dismissed the claimant.

38. The dismissing officer carefully considered each of the allegations that had been upheld and concluded that individually (and cumulatively) the claimant had demonstrated gross irresponsibility. She was satisfied the claimant was guilty of gross misconduct.

15 **Dismissal considered appropriate**

39. In respect of each allegation that gross misconduct had been found, with regard to sanction, the dismissing officer considered alternatives to dismissal. She took the time to consider whether dismissal could be avoided, notwithstanding the findings of gross misconduct. She concluded however
20 that the nature of the misconduct and potential impact on staff, patients and public confidence resulted in a lesser sanction not being suitable. In particular the dismissing officer concluded that the claimant's decision at the time had resulted in trust and confidence being destroyed. The claimant had been irresponsible in his decision making and he could not therefore remain
25 employed by the respondent. The respondent was not satisfied that the claimant's failure to exercise his decision making powers would not be repeated given the clear failure in this case (which was something that was not a spur of the moment action).

40. The claimant was dismissed on 17 May 2023.

30 **Claimant appeals his dismissal**

41. The claimant appealed his dismissal via letter on 29 May 2023. He provided a substantial amount of paperwork in support of his appeal.
42. An appeal hearing took place on Monday 24 July 2023. The appeal was conducted by Ms Carter, Director of Finance, Logistics & Strategy who had experience in these matters. The claimant was accompanied by his trade union representative.
43. The appeal panel considered all the information the claimant had submitted in detail and reached a unanimous decision.

Appeal outcome

44. A letter dated 31 July 2023 was sent to the claimant with the outcome of the appeal. The appeal was not upheld.
45. With regard to the argument that pool cars had been used elsewhere in an inappropriate way, that information had not been in the knowledge of the respondent and it had been passed to another manager to review and take appropriate action, which could result in disciplinary action being taken..
46. The absence of a clear written policy with regard to pool cars was taken into account albeit a duty manager ought to have sought clarification if there was any uncertainty as to the use of the respondent's assets. It was also noted that it is not always necessary to have a policy in respect of something that is obviously inappropriate.
47. The panel noted that the claimant recognised his actions were naïve and that he was profoundly sorry for what had happened, albeit the claimant sought to minimise his involvement as he had not driven the car nor authorised it. He had not influenced or pressured the driver but accepted actions of managers can be perceived by subordinates and that asking a "favour" could in some cases be considered an instruction when issued by a manager.
48. It was noted that the claimant had taken full responsibility and had been open and honest with regard to his actions. Nevertheless the claimant's actions had

been premeditated and no positive steps, for example, were taken to ensure the driver had only attended during a break to reduce time away from work.

49. The full mitigation the claimant had provided both at the original hearing and during the appeal process was taken into account, including length of service and disciplinary record. There was no basis to alter the outcome of the original hearing. With regard to sanction, the appeal panel considered whether dismissal was disproportionate and concluded it was not. As an experienced manager there is expected behaviours of such a role and the claimant's conduct demonstrated a very serious error of judgment which was so significant that trust and confidence had been irreparably damaged. Dismissal was considered appropriate as a sanction in all the circumstances.

Observations on the evidence

50. The Tribunal found that the witnesses answered questions to the best of their knowledge and recollection.
51. Ms Higgins was clear and candid in her approach and explained carefully how she considered the facts with which she had been presented and why she considered dismissal to be a fair and reasonable outcome in light of the facts before her and the prevailing circumstances. She was clear and considered. She had spent a significant amount of time assessing the evidence presented to her and made a careful decision based on the evidence and prevailing facts.
52. Ms Carter gave a clear account as to why the appeal was refused and the reasons for it. The panel had fully considered each of the points the claimant had made and took time to assess those as against the respondent's initial decision and the reasons for it.
53. The claimant was clear in his position and maintained his position that he had made an error of judgment. He had not considered the impact upon others and had instead focused upon his belief that he was entitled to use the vehicle if a duty manager had permitted it. He had not realised the impact such a

position may have, nor that such a position may in fact be incorrect (notwithstanding how others used the respondent's property).

54. There were no material disputes of fact in relation to the primary issues. Whilst a dispute arose in relation to whether or not the claimant had sought authorisation of the use of the car, that was not directly relevant to liability. That was because it was not disputed that the claimant had initiated use of the vehicle, that being the fact relied upon by the dismissing officer.

55. The claimant did not explicitly seek the authorisation of the duty manager that was working on the night in question. The claimant himself was a duty manager and he had asked a colleague (also a duty manager) whom he believed to be working on the night in question to use the vehicle but he had not followed the matter up on learning that individual was not at work on the night in question (and he assumed the consent of the duty manager had been obtained from the person who had driven his family home from the airport).

Law

Unfair dismissal

56. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason.

57. The reason for a dismissal is "a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee" Cairns LJ in *Abernethy v Mott Hay and Anderson* [1974] ICR 323 at page 330B-C.

58. The Tribunal must focus on the decision to dismiss and asks itself what fact or belief caused the employer to reach that decision.

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60. The Tribunal must focus on the decision to dismiss and asks itself what fact or belief caused the employer to reach that decision.
61. One of the potentially fair reasons is for matters relating to “conduct”. The burden of proof rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed misconduct and that belief was the reason for dismissal.
62. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).
63. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): “depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.”
64. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably: *Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden* [2000] ICR 1283. It should be recognised that different employers may reasonably react in different ways, and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.
65. Mr Justice Browne-Wilkinson in his judgement in *Iceland Frozen Foods Ltd v Jones* ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

- a. "The starting out should always be the words of section 98(4) themselves.
- b. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair.
- c. In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt.

In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

66. In terms of procedural fairness, the (then) House of Lords in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 established that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

67. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in *British Home Stores v Burchell* [1980] ICR 303 the employer must show:

- 5 a. It believed the employee guilty of misconduct;
- b. It had in mind reasonable grounds upon which to sustain that belief;
- c. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances;
- 10 d. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason, but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances
- 15 in dismissing for that reason, taking account of the size and resources of the employer, equity, and the substantial merits of the case.

68. In *Ilea v Gravett* [1988] IRLR 487 the Employment Appeal Tribunal considered the *Burchell* principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance

20 of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where

25 the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could

30 have reached the conclusion on the available relevant evidence.

69. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.
70. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In *Ulsterbus v Henderson* [1989] IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.
71. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in *Fuller v Lloyds Bank* [1991] IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see *Sainsburys v Hitt* [2003] IRLR 23).
72. The Court in *Babapulle v Ealing* [2013] IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must

act reasonably. Length of service can be taken into account (*Strouthous v London Underground* [2004] IRLR 636).

ACAS Code

73. In considering a claim for unfair dismissal by reason of conduct, the Tribunal
5 is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct.

Process to be considered as a whole

74. The reasonableness of the decision to dismiss is scrutinised at the time of the
10 final decision to dismiss – at the conclusion of the appeal process (*West Midland v Tipton* [1986] ICR 192). This was confirmed in *Taylor v OCS* [2006] IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary
15 process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Submissions

20 75. Both parties made detailed written submissions which were supplemented orally with both parties making relevant submissions in relation to each other's submissions. The Tribunal has taken into account the full submissions from the parties and refer to these, as appropriate, below.

Decision and discussion

25 76. The Tribunal spent time considering the evidence that had been led and the submissions made by both parties. The decision reached was unanimous.

Decision to dismiss within range of reasonable responses?

77. In this case the issues to be determined is in sharp focus. The parties had agreed that the respondent had a potentially fair reason to dismiss the claimant, his conduct, and that there were no issues with regard to the investigation (or procedure undertaken). The only issue was whether the respondent acted fairly and reasonably in dismissing the claimant, from the information before the respondent at the time, taking account of equity, substantial merits and the resources. In other words, did the decision to dismiss, based on the information the respondent had at the time, fall within the range of reasonable options open to a reasonable employer in light of the mitigation presented on the claimant's behalf.
78. The Tribunal considered whether the decision to dismiss fell within the range of reasonable responses in all the circumstances given what the claimant's submissions were in light of the facts. The Tribunal considered matters in light of the information that was in the mind of the respondent at the time it made the decision to dismiss, not substituting the Tribunal's view.
79. The reasons given by the dismissing officer were clear and cogent. She essentially concluded the claimant had been grossly irresponsible in his decision making. It was her position that it ought to have been known by a duty manager that the request the claimant had made of the respondent would not be permitted and seeking to use the pool car purely for personal purposes (with the attendant consequences) was grossly irresponsible.
80. She concluded the claimant's decision was poor. He had time to reflect as this was not a spur of the moment matter. It had been planned. On the face of it, the claimant had committed conduct that went to the root of the employment relationship and justified (in principle) dismissal. He had believed it appropriate to seek to use one of the respondent's vehicles to collect him from the airport on return from holiday and to request a colleague drive (even if assuming the colleague would leave work during his break to do the trip). That was reasonably considered to be an act of gross misconduct in light of the prevailing circumstances.

81. The respondent considered each of the issues in mitigation the claimant raised in support of his claim. It is important to consider these individually and then generally.

Length of service

5 82. The first issue was with regard to length of service. The claimant had service in excess of 20 years and had carried out the role from which he was dismissed for 5 years and 8 months. That was fully taken into account by the respondent and placed in the balance.

10 83. The long service the claimant had ought to have resulted in the claimant being more aware of his actions, how they may be perceived and the impact upon others. That was also a relevant consideration and placed in the balance. The claimant had not appreciated how his actions could be perceived by others and the potential consequences. This issue was therefore taken into account and did not, in itself, result in the decision to dismiss being unreasonable.

15 Clear disciplinary record

84. Secondly the claimant's clear disciplinary record was an important factor which the respondent did consider. That was placed in the balance and this issue was taken into account and did not, in itself, result in the decision to dismiss being unreasonable.

20 Absence of clear written policy

25 85. A key issue relied upon by the claimant in arguing dismissal fell outwith the range of reasonable responses was that there was no written policy or procedure applying to the use of pool cars which had been disseminated to the claimant. The absence of a policy was relevant but managers were expected to know that the respondent's vehicles ought only to have been used for service business. Nonetheless the absence of a policy making the position absolutely clear was something the respondent took into account in reaching its decision and did not, in itself, result in the decision to dismiss being unreasonable.

86. It is notable that the claimant's own representative gave him a "shredding" about his conduct in question. One of the respondent's managers (at a higher level than the claimant) had made it clear that it ought to have been obvious that the absence of a policy did not alter the position that it ought to have been obvious (and understood amongst managers) that a service vehicle should only be used for service business. It is also notable that none of the claimant's witnesses at the hearing was able to identify any situations where other misuse of the respondent's vehicles had taken place.
87. It was clear that the claimant's actions had taken a pool vehicle of the respondent's out of duty for a period of in excess of 45 minutes (with a member of staff being out of the building for that period). That was not insignificant given the nature of the respondent's business and the fast changing environment in which it operated.

The practice of misuse of company property

88. Fourthly, the claimant had argued that there was a practice within the organisation of using respondent's vehicles for personal use. The claimant had given examples of pool cars being used for purposes other than business purposes.
89. It was accepted by the claimant that none of the examples was identical to that of the claimant and that there was no evidence of the respondent knowing of such use and condoning it. His position was that he understood there to be real flexibility in the use of the respondent's property and if a duty manager approved use, non business use was permitted. Latterly the claimant accepted that was an error of judgment. His argument was that given the practice as he understood it, his misconduct ought to be viewed with less seriousness.
90. This is an important point and one the Tribunal spent time considering. Counsel for the claimant confirmed this was not a case where the claimant was arguing inconsistency of treatment (with others having done the same act of misconduct of the claimant being treated more leniently). Instead the

claimant was arguing there was a context to his error of judgment which required to be considered and balanced.

5 91. The respondent did, however, consider that context as presented by the claimant and the points the claimant made in this regard. There was no evidence the examples given by the claimant had been known by senior management and condoned. Many of the examples were materially different, for example relating to misuse of property in the course of business use as opposed to purely personal use being requested. Some of the examples may well have involved situations whereby the use of the respondent's property
10 had been permitted.

92. The respondent referred the examples that had been provided to a senior manager to investigate and take such action as deemed necessary, which could include disciplinary action. That was not disputed by the claimant.

15 93. The context of the claimant's actions was taken into account but that not detract from the error the claimant had made and the consequences of it. This issue was therefore taken into account and did not, in itself, result in the decision to dismiss being unreasonable. If others had been guilty of misconduct, that would be dealt with. Equally the fact that the claimant knew others had used the respondent's property in the way alleged was something
20 that was considered by the respondent in assessing the disciplinary issues. The respondent's approach to this issue was reasonable and fair.

Claimant's honesty

25 94. The fifth issue was that the claimant had been open and honest throughout. It was also relevant that the claimant had offered to pay back any sum reflecting financial losses sustained. Each of those facts was considered by the respondent. This issue was therefore taken into account and did not, in itself, result in the decision to dismiss being unreasonable.

Claimant's apology

95. The sixth issue was that the claimant admitted an error of judgment, apologised to the respondent and indicated he would not do the same thing again.

5 96. The respondent noted, however, that the claimant had not truly accepted responsibility. He still maintained at the time of the decision that he believed he was entitled to do what he did, which was a point disputed by the respondent.

10 97. The concern the respondent had was not that he would do the same thing again but that this action had shown that the claimant lacked insight, and the ability to recognise an inappropriate use of the respondent's resources. He had singularly focussed upon himself not recognising the impact upon others, which was a relevant consideration in assessing this particular matter. The potential reputational consequences ought to have been clear.

15 98. This issue was therefore taken into account and did not, in itself, result in the decision to dismiss being unreasonable.

Claimant offered to make good any loss

99. The seventh issue was that the claimant offered to make payment for any financial loss suffered by the Respondent occasioned by the use he made of the Pool car. That had been taken into account.

20 Claimant believed loss of time would be minimised

100. The eighth issue was the claimant's intention, which was accepted by the respondent, was that the driver would make the journey during a 45 minute unpaid break and so would not be away from duties. This was something taken into account, albeit the claimant had not made any specific reference to the individual making sure that was done. The respondent's approach was
25 reasonable.

Claimant had not personally authorised release of vehicle

101. Ninth the claimant had argued he had not himself authorised the use of the pool car and that reduced his culpability. The respondent considered that it

was the act of asking the respondent's resources be used for a purely personal matter that had resulted in his poor decision making. The act of authorising use of the vehicle did not alter the fact the claimant believed his request was appropriate.

5 102. The fact therefore that the claimant had not himself authorised the use of the vehicle (even although disputed) did not affect the central issue in this case, that the claimant considered it acceptable to ask to use the respondent's asset entirely for personal purposes. Others were involved in using the asset for the claimant's personal use led to disciplinary action being taken in relation to
10 those individuals. The respondent's approach to this issue (and their conclusions) with regard to the claimant was reasonable from the information they had. It did not result in the decision to dismiss being unfair.

103. Even if the claimant was correct, and he had not authorised the use of the vehicle, the issue for the respondent was the fact that the claimant considered
15 it acceptable to seek to take a pool car out of service for purely personal purposes (with a staff member being taken away from the premises for a minimum period of 45 minutes). That in itself was a very serious failure and demonstrated a severe lack of good judgment and decision making. It was the irresponsible decision making that had led, in large part, to the claimant's
20 dismissal. That outcome, even accepting the claimant's position, was an outcome that a reasonable employer could reach.

104. In any event, even on the basis of the claimant's own case, the claimant believed that the consent of the duty manager at the time in question was needed. The claimant had not in fact sought the consent of the duty manager
25 in question since the duty manager he assumed was on duty was not. He did not seek the express consent of the duty manager on duty on the night in question (nor check such consent had been obtained). Instead he relied upon his belief that the more junior employee who had driven the vehicle had sought such consent.

30 **Time taken to conclude matters**

105. The final matter of mitigation was that around 10 months had passed between the relevant misconduct and the disciplinary hearing. The claimant had encountered severe challenges as a result of the experience which had impacted on his health. That was a mitigating factor that fell to be considered.

5 This was something that had been considered by the respondent. The position adopted was reasonable in all the circumstances.

In relation to individual issues, respondent acted reasonably

106. The claimant's position was that in light of the foregoing individual issues, dismissal was unreasonable. The Tribunal did not uphold that submission.

10 Having considered each of the individual factors, the Tribunal was satisfied the respondent acted fairly and reasonably. There were other options open to the respondent and other employers may well have approached matters differently but on the facts of this case in relation to each individual matter, the approach of the respondent was fair and reasonable.

15 107. The respondent was reasonable in its conclusion that a duty manager, particularly with the length of service the claimant had, ought to have known that use of the vehicle in the manner sought by the claimant was not permitted and not likely to be permitted. The fact others misused the respondent's assets did not alter the position. Nor did the absence of a clear policy alter that fact. The position the respondent adopted, that it ought to have been

20 obvious that use of the pool car for purely personal purposes, had considerable force and was a conclusion that a reasonable employer could have reached, notwithstanding the practice the claimant said was evident.

108. The respondent acted reasonably in concluding the claimant's conduct was such, individually, to amount to misconduct that justified his dismissal. The

25 fact he considered such a request to be acceptable was a powerful indicator as to how he may conduct himself going forward. That was not an unreasonable conclusion from the facts of this case and supported the respondent's decision that they had lost trust and confidence in the claimant's

30 ability to make the right decisions.

109. The Tribunal was satisfied that the individual allegations found to be gross misconduct did, themselves, fairly justify the respondent's conclusion as to dismissal on the facts before the respondent. The respondent acted fairly and reasonably in that regard, having taken into account each of the points raised
5 by or on behalf of the claimant. There was no individual mitigation issue raised by the claimant which rendered the decision to dismiss unreasonable.

Placing all matters in balance, respondent acted reasonably

110. The Tribunal then considered the claimant's argument that taken together or cumulatively, the mitigation issues arising showed that the decision to dismiss
10 fell outwith the range of responses open to a reasonable employer. The Tribunal did not accept that proposition.

111. From the information before the respondent, dismissal was not outwith the band of reasonable responses. While some employers may well have opted for a lesser sanction, on the facts of this case, an equally reasonable and fair
15 employer could have done precisely as the respondent did in light of the information before the respondent and taking account of each of the points made on the claimant's behalf at this Tribunal. The fact other employers might well have accepted the claimant's position rather than that adopted by the respondent in matters that were disputed, did not mean the approach the
20 respondent took was unreasonable. The respondent's approach and conclusions it reached on the facts before it fell within the range of options open to a reasonable employer in light of the fact at the time the decision was made from the information before the respondent.

112. The respondent fully considered the points the claimant made. The
25 respondent accepted some of the points made by the claimant (such as his believing the activity would take place during the driver's break) and fairly balanced the points reasonably considered to be mitigation in reaching its decision. While it did not accept the claimant's position in relation to each point raised by way of mitigation, the approach the respondent took (and
30 conclusions reached) fell within the range of responses open to a reasonable employer in its approach and conclusions from the information before it.

113. The claimant accepted he was guilty of misconduct. The conduct was such as to go to the root of the employment relationship in light of the prevailing facts. The decision the claimant had made failed to appreciate the impact upon others. His decision was reasonably considered by the respondent to have been irresponsible and indicative of a serious failure to appreciate the impact upon others and the reputation of the respondent. It was reasonable for the respondent to conclude the conduct amounted to conduct that could justify dismissal taking account of the points raised by the claimant.
114. The fact others had misused the respondent's assets did not result in the claimant's misuse being permissible. The fact there was no policy did not result in pure personal use being permissible even in the context presented by the claimant. The claimant recognised with hindsight that he had made an error. That error was reasonably considered by the respondent to have been of sufficient seriousness to justify his dismissal and to reasonably lead to the outcome in this case even taking account of the mitigation arising.
115. Each of the points raised by the claimant in this Tribunal as rendering the decision to dismiss as unreasonable were properly and fairly considered by the respondent. The Tribunal did not accept the points were such as to render the decision to dismiss unreasonably in all the circumstances – individually or taken together. The full mitigation was properly and fairly taken into account and balanced against the conduct of the claimant. The respondent fairly considered all the mitigation and balanced those factors as against dismissal. Ultimately dismissal was a decision that was fair and reasonable in all the circumstances, even taking account of the cumulative effect of each of the mitigation points raised by or on behalf of the claimant. The impact of his conduct, even as viewed by the claimant, was such as to entitle a reasonable employer to act as the respondent did.
116. The respondent considered alternatives to dismissal and genuinely ascertained whether dismissal could have been avoided. Dismissal was not a foregone conclusion and serious consideration was given to identifying ways to avoid dismissal. That approach was reasonable and fair. The decision to

dismiss the claimant fell within the range of responses open to a reasonable employer.

5 117. The Tribunal took into account the size and administrative resources of the respondent. The Tribunal also took into account equity and the merits of this case. There was considerable mitigation in respect of the conduct but that mitigation was fully and properly and fairly considered by the respondent. Even if the claimant's position was accepted, the respondent would still have acted fairly and reasonably in dismissing the claimant on the facts. The conclusion the respondent reached and the position the respondent adopted
10 in relation to the issues was one which a reasonable employer could reach.

118. The Tribunal must not substitute its decision for that of the respondent but apply the statutory wording and authorities set out above. The claimant had made an error of judgment, which he subsequently accepted. It was not a spur of the moment decision nor something in the heat of the moment. The
15 claimant knowingly sought to use the respondent's property solely for his personal use. He held a senior position and he ought to have understood the context within which the decision he took would be viewed, notwithstanding what he knew about others who had misused the respondent's property.

20 119. The respondent's approach in assessing the mitigation he presented was an approach a reasonable employer could take on the facts before the respondent. The respondent did not act unreasonably in not accepting in full each of the points the claimant made. Its response fell within the range of responses open to a reasonable employer on the facts in relation to the individual issues relied upon by the claimant in his case.

25 **Taking a step back...**

120. Taking a step back, the Tribunal was satisfied from the evidence before the respondent at the time, that the respondent acted fairly and reasonably in dismissing the claimant, for his conduct, taking account of size, resources, equity and the merits.

121. The Tribunal was able to make its decision with the benefit of non legal members, who unanimously concluded that the decision the respondent took on the facts of this case fell within the range of responses open to a reasonable employer. This was a unanimous decision.

5 122. The decision to dismiss the claimant, in light of all the facts, including the mitigation presented by the claimant and on the claimant’s behalf fell within the range of responses open to a reasonable employer.

Issues of remedy not considered

10 123. In light of the Tribunal’s unanimous conclusion, it is not necessary to consider issues pertaining to remedy.

Claim is dismissed

124. From the evidence presented to this Tribunal, the Tribunal finds that the claimant was not unfairly dismissed and his claim of unfair dismissal is accordingly dismissed.

15 **Agents thanked for their professionalism**

125. Finally, the Tribunal wishes to formally record its appreciation of the parties’ agent’s professionalism in the way the agents worked together to focus the issues in this case in accordance with the overriding objective and in their presentation and conduct before this Tribunal.

20

D Hoey

Employment Judge

25

31 January 2024

Date

30

Date sent to parties

31 January 2024
